No. 05-1345

In the

SUPREME COURT OF THE UNITED STATES

UNITED HAULERS ASSOCIATION, INC., *et al.*,
Petitioners,
v.
ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*
Respondents.

BRIEF *AMICI CURIAE* of the ARKANSAS ASSOCIATION of REGIONAL SOLID WASTE MANAGEMENT DISTRICTS, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, CITY OF TAMPA, CONNECTICUT CONFERENCE of MUNICIPALITIES, CONNECTICUT RESOURCES RECOVERY AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, ECOMAINE, GREATER LEBANON REFUSE AUTHORITY, MARION COUNTY, OREGON, METRO REGIONAL GOVERNMENT, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NEW YORK STATE ASSOCIATION of COUNTIES, NORTHWEST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT, OUTAGAMIE COUNTY, WISCONSIN, PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY of CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY of the CITY of HUNTSVILLE, SPOKANE REGIONAL SOLID WASTE SYSTEM, WASATCH INTEGRATED WASTE MANAGEMENT DISTRICT and the YORK COUNTY SOLID WASTE and REFUSE AUTHORITY

IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* of the ARKANSAS ASSOCIATION of REGIONAL SOLID WASTE MANAGEMENT DISTRICTS, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, CITY OF TAMPA, CONNECTICUT CONFERENCE of MUNICIPALITIES, CONNECTICUT RESOURCES RECOVERY AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, ECOMAINE, GREATER LEBANON REFUSE AUTHORITY, MARION COUNTY, OREGON, METRO REGIONAL GOVERNMENT, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NEW YORK STATE ASSOCIATION of COUNTIES, NORTHWEST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT, OUTAGAMIE COUNTY, WISCONSIN, PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY of CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY of the CITY of HUNTSVILLE, SPOKANE REGIONAL SOLID WASTE SYSTEM, WASATCH INTEGRATED WASTE MANAGEMENT DISTRICT and the YORK COUNTY SOLID WASTE and REFUSE AUTHORITY

IN SUPPORT OF RESPONDENTS

Amici curiae Arkansas Association of Regional Solid Waste Management Districts, *et al.*, submit this brief in support of Respondents Oneida and Herkimer counties and the Oneida-Herkimer Solid Waste Management Authority

(referred to in common as "Oneida-Herkimer").[1] *Amici* are further described in the Appendix to this brief, and include counties, special authorities, city and regional governments and related associations responsible for (or whose members are responsible for) municipal waste management in their communities and dedicated to implementing federal and state policies that encourage "integrated waste management."[2] A fundamental tool in meeting *amici's* solid waste management responsibilities is reliance on "flow control" authority, that is, local ordinances (or regulations) which designate the recycling, waste processing and disposal facilities for serving a given community. In upholding the respective flow control ordinances of Oneida and Herkimer counties against the claim that the ordinances constitute per se discrimination under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), the two Second Circuit decisions at issue here, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) (*United Haulers I*) (Pet. App. 22a-53a) and 438 F.3d 150 (2d Cir. 2006) (*United Haulers II*) (Pet. App. 1a-21a), rejected, consistent with other circuits, mechanical application of the per se discrimination standard "without reference to the unique

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[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and Respondents have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] The term "municipal solid waste" means "residential and commercial solid wastes generated within a community." 40 C.F.R. § 240.101(q). "'Integrated waste management' refers to the complementary use of a variety of waste management practices," including reuse of products, recycling of materials, waste-to-energy combustion and landfilling "to safely and effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment." *The Solid Waste Dilemma: An Agenda for Action*, U.S. Environmental Protection Agency, EPA/530-SW-8-019, at 16 (Feb. 1989) (cited below as "*Agenda for Action*").

facts of this case."[3] *Amici* respectfully urge this Court to affirm the court of appeals' judgment.

STATEMENT OF INTEREST OF *AMICI*

Amici's interest in this case arises from the ever increasing volume of municipal solid waste generated in the United States, for which primary responsibility falls on the shoulders of local government, as Congress has expressly acknowledged. In that regard, the Court has long recognized that authority over solid waste management is inherent in the police power of local government. *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Mich.*, 199 U.S. 325 (1905). The Resource Conservation and Recovery Act (RCRA) codifies recognition of that police power authority, *see* 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies"), as do the laws of essentially every state.[4] The

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[3] *See* Pet. App. 39a, citing *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 798 (3d Cir. 1995) and *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999). The court relied on two significant distinctions between the flow control ordinances in this case and the flow control ordinance at issue in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). First, Clarkstown's ordinance, unlike the Oneida-Herkimer ordinances, attempted to regulate disposal of waste that was merely in transit through the town (the extraterritorial aspect of the Clarkstown ordinance was the only issue for which review by this Court was sought in *Carbone*). *See* Pet. App. 42a, n.4. Second, selection of the publicly-owned facilities to which the Oneida-Herkimer ordinances directed waste was not the result of favoritism for the benefit of local private business interests but rather because, as the record demonstrates, in directing waste to the Oneida-Herkimer facilities, the Counties' flow control ordinances fulfill an essential governmental responsibility. *Id.* at 23a-30a.

[4] *See, e.g.*, Or. Rev. Stat. § 459.065 (broad authority conferred on local government for solid waste management, which is "a matter of statewide concern"); 53 Pa. Cons. Stat. §§ 4000.303(a), 4000.304(a) (Pennsylvania municipalities have primary responsibility for processing and disposal of locally generated municipal waste); Me. Rev. Stat. Ann. Title 38, § 1305.1 ("Each municipality shall provide [for] solid waste disposal

volume of municipal waste generated in the United States has increased by more than 50 percent since 1980, exceeding 245.7 million tons in 2005, *Municipal Solid Waste in the United States: 2005 Facts and Figures*, U.S. EPA (*available at* http://epa.gov/epaoswer/non-hw/muncpl/msw99.htm), and managing municipal solid waste in an environmentally-protective and efficient manner is a difficult task that requires significant state and local government resources. *Carbone*, 511 U.S. at 385; *see also Or. Waste Sys. v. Dep't of Envtl Quality*, 511 U.S. 93, 109 (1994) (describing municipal waste management as a "vexing national problem") (Rehnquist, C.J., dissenting).

The Nation's growing waste stream requires comprehensive planning by local government to address the broad range of public health, environmental and economic issues involved. For that reason, a principal RCRA objective is detailed state and local solid waste management planning, including emphasis on assuring capacity adequate to meet the affected communities' "present and reasonably anticipated future needs." 42 U.S.C. § 6941; *see also id.* §§ 6902(a)(1), 6942 and 6943.[5] Such planning must

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services for domestic and commercial solid waste generated within the municipality"); Ala. Code § 22-27-48 (counties and municipalities responsible for assuring proper management of solid waste); Conn. Gen. Stat. § 22a-220 (each municipality responsible for arranging for solid waste collection and disposal); Utah Code Ann. § 19-6-503 (all counties, special service districts and municipalities must provide adequate capacity for solid waste generated within their jurisdiction). *See also* Wash. Const. art. XI, § 11 (Washington municipalities granted sanitation authority equivalent to authority of the state legislature).

[5] EPA has noted RCRA's "great emphasis" on state, regional and local planning, which, among other things, "must provide for adequate recycling and disposal capacity and must address [waste management] facility planning and development." *Report to Congress on Flow Controls and Municipal Solid Waste*, U.S. EPA, EPA 530-R-95-008, at 1-2 (Mar. 1995), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl.htm (cited below as "*Report to Congress on Flow Control*"). *See also* Wash. Rev. Code §§ 70.95.080 and 70.95.090(3) (each county to prepare a comprehensive solid waste management plan

consider the broad range of public health, environmental and economic issues involved, and "present[s] these communities with serious financial, management, intergovernmental, and technical problems." *See* 42 U.S.C. § 6901(a)(3). These factors represent a reality of solid waste management which may be referred to as "The Second Law of Garbage": More specifically, absent government intervention, management of municipal solid waste will generally default to the lowest cost (in terms of short-term costs) and frequently less environmentally sound alternatives. *See Facing America's Trash: What Next For Municipal Solid Waste?*, Office of Technology Assessment 101st Cong., at 275 (Oct. 1989); *see also Agenda for Action* at 8 (describing the "First Law of Garbage" as "Everybody wants us to pick it up, and nobody wants us to put it down"). Flow control changes that dynamic by facilitating implementation of the environmentally-preferable waste management infrastructure alternatives selected by the affected community. *See* Public Meetings on Municipal Solid Waste Flow Control, 58 Fed. Reg. 37,477, 37,478 (July 12, 1993) (noting the more active role of state and local government in integrated waste management planning, EPA refers to flow control as a "key tool" for implementing such plans).

This is the context in which each of the *amici* (and the members of the association *amici*) – as well as many other local governments – have turned to flow control to effectuate their waste management decisions, including selection of the

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including "a program for the orderly development of solid waste handling facilities in a manner consistent with plans for the entire county" and "a plan for financing both capital costs and operational expenditures"); Ohio Rev. Code §§ 3734.52(A) and (B), 3734.55 and 3734.53(A) (each county required to participate in a solid waste district for the purpose, among other things, of preparing a solid waste management plan providing for proper management of municipal solid waste and certifying availability of sufficient solid waste management capacity to serve county's residents for ten-year minimum period).

waste management facilities best suited for their communities (whether a recycling center, resource recovery – also referred to as "waste-to-energy" – facility, composting plant, waste transfer station or another type of waste management infrastructure). Thus, since 1980 a considerable number of local governments have relied on flow control authority in issuing more than $20 billion in public debt for the construction of state-of-the-art, environmentally protective waste management infrastructure. *Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on Environment and Public Works*, 105th Cong. (Mar. 18, 1997) (Testimony of Randy Johnson, Chair, Board of County Commissioners Hennepin County, Minnesota and President-Elect, National Association of Counties). Such environmentally advanced waste management systems are quite expensive and often extremely difficult to develop and operate without use of flow control. Flow control ordinances implement the affected communities' determinations regarding the facilities that will best achieve their waste management strategies. While the community's choices may self-impose more short-term expense, the use of flow control is a highly cost effective and efficient means for the community to counteract the attraction of the lower short-term costs of environmentally less preferable alternatives.

The circumstances in which *amici* and Respondents turned to flow control to meet their governmental responsibility for solid waste management are very similar and have the primary objective of maximizing waste reduction, recycling and reuse. *See* Resp. Br. 3-8. *See also Agenda for Action* at 16-21 (describing hierarchy of waste management methods, which are, in order of priority, waste reduction and minimization, recycling, energy recovery, and sanitary landfill disposal). Contrary to Petitioners and their *amici*, neither the Respondents nor any of the *amici* are in

the "business of selling waste disposal services." Instead, *amici*, like Respondents, have primary responsibility for municipal solid waste management in their communities, and flow control is a fundamentally important tool in meeting that core governmental responsibility for protection of public health and the environment.

SUMMARY OF ARGUMENT

The Second Circuit should be affirmed because the court correctly recognized the vital role of flow control in facilitating local government's solid waste management responsibility. In meeting their responsibilities, local governments do not compete with private companies such as Petitioners, and the solid waste management decisions and actions of local governments bear no resemblance to the entrepreneurial activity of private businesses engaged in waste collection and disposal.

As shown in the record here, flow control authority, in facilitating Respondents' ability to satisfy their statutory responsibilities for solid waste management, neither discriminates against interstate commerce nor implicates the protectionism concerns that underlie this Court's dormant Commerce Clause jurisprudence. Moreover, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services in comparison to the Petitioners' narrower waste collection-disposal business enterprises, and those differences further preclude Petitioners' discrimination claim. Finally, the tax subsidy and similar alternatives advocated by Petitioners would have the same – or even more – impact on commerce (as opposed to less impact) than flow control. Under such circumstances, the authority to choose between alternatives for meeting their public service obligations resides with Respondents and other states and localities responsible for municipal waste management.

ARGUMENT

The Second Circuit Correctly Ruled That The Oneida-Herkimer Flow Control Ordinances Do Not Facially Discriminate Against Or Unduly Burden Commerce And Petitioners' Contrary Arguments Misapprehend Local Government Responsibility For Solid Waste Management

A. Local Government's Solid Waste Management Responsibility Bears No Resemblance To Entrepreneurial, For-Profit Activity

A principal theme of Petitioners' brief is their repeated assertion that Oneida-Herkimer is in "the business of selling waste disposal services to private haulers" (Pet. Br. 36) and uses flow control "to shield [its] market activities from interstate competition." *Id.* at 12; *see generally id.* at 11-12, 23, 35-37. Petitioners' contentions are invalid and disregard a fundamental principle: In implementing their core governmental responsibility for solid waste management, local governments are not "in competition" with Petitioners and are not engaging in "market activities." Petitioners' characterizations of Oneida-Herkimer's integrated waste management system as "protectionist" also ignore the fact that under this Court's dormant Commerce Clause jurisprudence local government actions in furtherance of a core governmental function that treat all out-of-state interests on the same basis as in-state interests are not protectionist.[6]

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[6] Petitioners' contentions should be taken with more than a few grains of salt given private waste companies' strong endorsement of flow control in other cases. For example, in Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., No. C-3-93-319, which Petitioners cite in their brief (Pet. Br. 39 n.11), Waste Management, Inc. of Ohio (WMI) described the flow control regulations at issue as follows:

> The record portrays that the local benefits of the District's waste flow rules and incentive fee system are substantial. . . . It is the basis of the County's ability to plan and execute long- and short-term disposal arrangements. As such it is indispensable. . . . These

1. As noted above, local government responsibility for solid waste management, including the use of flow control, is the opposite of the for-profit, entrepreneurial activity that is traditionally performed by private businesses and, instead, has longstanding recognition as a core government function. *See Cal. Reduction Co.*, 199 U.S. 306; *Gardner*, 199 U.S. 325; s*ee also City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) (it is settled law that "garbage collection and disposal is a core function of local government in the United States"). In that regard, flow control ordinances implement delegated state police power authority for protection of public health, welfare, safety and

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> rules are part of a comprehensive long-term effort to deal with health, safety and environmental problems associated with solid waste disposal in Clark County.
>
> . . .
>
> The contested rules and regulations in this case are not protectionist measures and are directed to legitimate local concerns that do not have *any* effect upon interstate commerce that is more than merely incidental. Indeed, there is no indication in the record that WMI's actions are protective measures designed to discriminate against interstate commerce. The effect on interstate commerce, if any, is only minimal. The record does not indicate that any national or regional market is substantially effected [sic] by the District's rules. The only identifiable costs are local.

Mem. of Intervenor, Waste Management of Ohio, Inc., at pp. 24 and 33, Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., No. C-3-93-319 (S.D. Ohio Mar. 9, 1994) (original emphasis). These are not the transient statements of a disinterested third party. To the contrary, Waste Management of Ohio is part of the largest U.S. waste company, Waste Management, Inc., *see Hauling & Disposal Ranking*, Waste News, July 17, 2006, at 15-19, which, in turn, is the largest member of *amicus* National Solid Wastes Management Association (NSWMA), *see* http://www.wastec.org/impak/eia/main/member_list.asp?action=start&aff=nswm, and NSWMA is paying each of the Petitioners' legal fees in this litigation. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. CV-95-0516 (N.D.N.Y.), Deposition of Mark Berkman, Ph.D., Feb. 11, 2003 ("Berkman Dep."), Tr. 10 (statement by United Haulers' counsel).

the environment. *See, e.g.*, Ala. Code §§ 22-27-3 and 22-27-40(3); Conn. Gen. Stat. § 22a-258; N.J. Stat. Ann. § 13:1E-2(a); Or. Rev. Stat. § 459.015(2). This point is evident from state laws authorizing flow control.

For example, in Wisconsin a prerequisite to a municipality's use of flow control is a finding that flow control "is in the best public interest," which in turn requires a determination that use of designated waste management facilities will, among other things, conserve energy or natural resources, lessen demand for solid waste disposal facilities, and that the alternatives to flow control "have been compiled, analyzed and considered." Wis. Stat. § 287.13. Under Minnesota's comparable statute, use of flow control requires the affected local government to prepare a plan demonstrating that flow control "will better serve to protect public health and safety" and is necessary to achieve local waste management plans and policies. Minn. Stat. § 115A.84, subd. 2. *See also* 53 Pa. Cons. Stat. § 4000.502(f) (as a prerequisite to exercise of flow control, a county's solid waste management plan must "[e]xplain in detail the reason for selecting such facility," "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or programs from among alternatives which were suggested to the county," and "[e]valuate [for the affected facility] the environmental, energy, life cycle cost, [and] the costs of transportation . . . as well as the [costs of the] alternatives."); Me. Rev. Stat. Ann. Title 38, § 1304-B.2 ("[M]unicipalities are expressly authorized to enact ordinances that control solid waste . . . delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes.").

This is the context in which the court of appeals concluded in *United Haulers I* that the Counties' flow

control ordinances do not facially discriminate under the dormant Commerce Clause. As the Second Circuit explained, "[t]he common thread in . . . dormant Commerce Clause jurisprudence," which is not present in this case, is where "a local law discriminates against interstate commerce [by] . . . hoard[ing] local resources *in a manner* that favors local business, industry or investment over out-of-state competition." Pet. App. 47a (original emphasis). *Accord, Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) (describing purpose of Commerce Clause as preventing a state from placing "burdens on the flow of commerce across its borders *that commerce wholly within those borders would not bear*") (emphasis added); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *Philadelphia v. New Jersey*, 437 U.S. at 629 ("The New Jersey law blocks the importation of waste in an obvious effort *to saddle those outside the State with the entire burden* of slowing the flow of refuse into New Jersey's remaining landfill sites") (emphasis added).

In contrast, selection of a single service provider to the exclusion of all others – both in-state and out-of-state – to provide essential services to the public, which is the precise result of flow control, is not discrimination under the dormant Commerce Clause. *See Houlton Citizens' Coalition*, 175 F.3d at 188 ("We do not interpret *Clarkstown* [*Carbone*] as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator"); *Harvey & Harvey*, 68 F.3d at 798, 803 ("That [an] ordinance requires the use of [a] selected facility . . . (which may be out of state), does not itself establish a Commerce Clause violation" because "local governments have the capacity, in the practical exercise of their police powers, which are at their strongest in the health and safety area, to contract with

specific businesses to provide certain services"). On such bases the Court has recognized that state and local governments may, consistent with the dormant Commerce Clause, restrict private companies' access to local markets where the public interest is better served by a single provider or public service monopoly. Thus, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 336-37 (1951), the Court rejected a dormant Commerce Clause challenge to a state regulation restricting the direct sale of natural gas to the holder of a certificate of public convenience and necessity authorizing such sales, explaining that "[a]lthough the end result might be prohibition of particular direct sales, . . . it is no discrimination against interstate commerce for Michigan to require . . . sales of gas through the existing certificated utility where public convenience and necessity would not be served by direct sales" and the underlying statute "does not distinguish between an interstate or intrastate agency."

2. The importance of local government's traditional, core responsibility for solid waste management is all the more acute in this case given the fundamental difference between the motivations that underlie for-profit entrepreneurial activity in comparison to the public health and safety responsibilities that underlie flow control ordinances. Thus, flow control does not present a situation in which local governments are engaging in "a business activity . . . activity in which a profit is realized." *See City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 418 (1978) (Burger, C.J., concurring) (internal quotations omitted). Similarly, "there is no valid comparison between, on the one hand, the State's [favoring] . . . an enterprise devoted to the making of profit and, on the other hand, the State's . . . [favoring] an enterprise which, for the purpose at hand, has the same objective as the State itself (the expenditure of funds for social welfare)." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 605 n.4 (1997) (Scalia, J., dissenting).

Nor is it correct for Petitioners to suggest that public ownership of waste management facilities is important as an end in itself. *See* Pet. Br. 27 ("In the [Second Circuit's] view, the concerns animating [the Court's dormant Commerce Clause] cases disappear when the favored facility is owned by a public entity"); *see also id.* at 2, 3, 11-12, 25-26. Thus, contrary to Petitioners' contention that *United Haulers I* represents a "formalistic" or legal title-driven standard, the essential point in this case is the clear demonstration in the record that the Counties' flow control ordinances direct waste to the Oneida-Herkimer facilities in furtherance of "a comprehensive waste management system . . . to provide for the safe and cost-effective disposal of their residents' solid waste," *United Haulers I*, Pet. App. 24a, and the outcome does not change depending on whether legal title to such facilities is nominally public or private. Put another way, private ownership does not in and of itself preclude a facility from serving the public interest any more than a local government's public entity status guarantees that its actions will always serve the public interest. *See City of Lafayette v. La. Power*, 435 U.S. at 418-22 (Burger C.J., concurring).

It bears emphasis that restrictions which may arise under the dormant Commerce Clause when "the State is acting . . . [as] a traditionally 'private enterprise,'" such as "conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants,'" *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684-85 (1999), have no resemblance to Oneida-Herkimer's – or *amici's* – use of flow control. To the contrary, the public service obligations that local governments fulfill through the exercise of flow control are not, needless to say, an obligation of any private enterprise engaged in solid waste collection or disposal. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 447 n.1 (1980), Powell,

J., dissenting ("By 'protectionism,' I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market," and "I would exclude from this term policies relating to traditional governmental functions"). And in implementing its responsibilities, no local government can "pick out good portions of a particular territory, serve only select customers . . . , and refuse service to other users." *Gen. Motors v. Tracy*, 519 U.S. 278, 297 (1997) (internal citation omitted). In short, local governments that rely on flow control do not undertake their solid waste management responsibilities for profit, entrepreneurial spirit or the like, but rather to satisfy one of their most basic governmental obligations.[7]

B. The Considerable Difference Between Petitioners' Collection-Disposal Businesses And Respondents' Integrated Waste Management Service Further Precludes Any Notion Of Discrimination

Petitioners' discrimination claim is also belied by the Court's recognition in *General Motors v. Tracy* that under the dormant Commerce Clause "any notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. at 298. The Court addressed this matter as follows:

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are

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[7] *See United Haulers I*, Pet. App. 52a-53a ("[T]his case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function . . . Whether the same analysis would apply to activities that are not traditionally governmental is not before us.") (Calabresi, J., concurring).

> indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 298-99; s*ee generally id.* at 297-303. The importance of comparing substantially similar entities has particular application in the context of flow control. That is because local governments that rely on flow control typically provide a comprehensive array of statutorily-mandated waste management services which go well beyond the narrower waste collection-disposal business enterprise that underlies Petitioners' claim of discrimination. *See United Haulers I,* Pet. App. 29a-30a.

More specifically, the waste management functions performed by local governments that rely on flow control (including *amici*) will typically comprise, in addition to disposal of non-recyclable waste, a number of environmentally-essential services such as recycling, household hazardous waste programs, yard waste collection, related educational programs and comprehensive planning. As noted earlier (*see supra* n.2), such recycling and related services are referred to as "integrated waste management" (IWM) services. Because these services "generally do not lend themselves to generation of their own revenues," *Report to Congress on Flow Control* at ES-11 (*see also id.* at III-80), the affected local governments charge a "system" fee which, although imposed only on disposal of non-recyclable waste, supports the full array of integrated waste management services provided. This point is addressed by Oneida-Herkimer's expert witness, Dr. Robert Stavins:

> All Authority activities are financed by a system charge levied on non-recyclable waste together with revenues derived from the sale of recyclable materials. Authority "tipping fees" for disposal of non-recyclable waste are set so as to assure that revenues are sufficient to cover

> the Authority's overall costs, and are generally higher than tipping fees charged by disposal facilities which do not provide or support similar recycling or other services.

J.A. 357a-358a (¶ 9); *see also id.* at 376a (¶ 42), 381a (¶ 49) ("[T]hese programs are supported by the system charge on non-recyclable waste and are not structured to generate fee revenue, but to encourage greater separation and delivery of material," and "charging tipping fees for non-recyclable waste that support all waste system components, and not charging fees for delivery of recyclables . . . [or yard waste and household hazardous waste collection programs, education, etc.], provides greater incentives not only for complying with recycling laws, but also for reductions in the generation of waste.").[8]

Addressing the same point in its *Report to Congress on Flow Control*, EPA explains (with reference to waste-to-energy facilities) that "[d]ue to flow control," the affected local governments' system fees "often cover other municipal system costs (e.g., curbside recycling). In contrast, private regional landfills are more likely to set tipping fees at (lower) levels that recover disposal costs only." *Report to*

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[8] Thus, in addition to supporting environmentally beneficial programs that cannot generate their own revenues, *see Report to Congress on Flow Control, supra,* flow control also provides financial incentives for waste reduction and recycling that are not possible through other means such as tax subsidies, which do not create the same difference in relative prices that comes with increasing the price for waste disposal. J.A. 388a-389a (¶ 60). *See also* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. CV-95-0516 (N.D.N.Y.), Deposition of Robert N. Stavins, Feb. 13, 2003, Tr. 197 (incentive for waste reduction that results from pricing waste disposal "above marginal cost . . . could not be sustained in a private market in the absence of . . . flow control."); *Variable Rates In Solid Waste: Handbook For Solid Waste Officials*, U.S. EPA, EPA/530-SW-90-084A, Vol. I–Exec. Summ. 2 (Sept. 1990) (discouraging use of local taxes, such as property taxes, to support solid waste management services because such use of property taxes fails to give "residents *any* incentive to reduce their waste" (original emphasis)).

Congress on Flow Control at III-51; *see also United Haulers I*, Pet. App. 25a ("tipping fee" refers to the waste disposal charge or gate fee at a disposal facility). Similarly, in *The Cost of Flow Control – Critical Review of the National Economic Research Associates Analysis (May 1995)*, New Hampshire Department of Environmental Services (Nov. 1995) (cited below as "*NHDES Report*"), the agency emphasizes that the system fees charged by flow control-reliant communities will almost always recover, in addition to the cost to dispose of non-recyclable waste, the costs of environmentally-essential services such as recycling, household hazardous waste collection and public education. *NHDES Report* at 1.[9] "The public typically views IWM programs funded through [system] fees as a 'free' addition to locally provided waste management service," and, accordingly, "they tend to use these programs more heavily than if recycling, HHW [household hazardous waste] collection, composting, and other IWM programs were billed on a fee-for-service basis." *Id.* As the *NHDES Report* also explains, it is "the duty of public authorities to respond to public (and frequently legislative) mandates to provide these services." *Id.* at 4.[10]

Putting this matter in context, Petitioners' failure to recognize the significant difference between their collection-

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[9] The May 1995 study that the New Hampshire DES examined, *The Cost of Flow Control*, National Economic Research Associates, is in the record and was a reference source for the report of appellants' expert, Dr. Mark P. Berkman (Dr. Berkman was an author of *The Cost of Flow Control*). *See* J.A. 204a & n.16, 218a (¶ 3). Pursuant to Rule 32.3, *amici* have submitted a letter to the Clerk of the Court requesting permission to lodge the *NHDES Report* with the Court.

[10] Petitioners' position (as explained by their expert witness) is that even though use of a system fee encourages recycling, they "don't know if recycling is a benefit" and the "undifferentiated tipping fees [system fees] often associated with flow control lead to inefficient levels of recycling and hide the true cost of recycling." Berkman Dep., Tr. 139, 141; J.A. 204a.

disposal business enterprises and the statutorily-driven integrated waste management services provided by flow control reliant communities "ignore[s] what is probably the single most important variable that differentiates public, flow-controlled facilities from private disposal sites" and results in a "false comparison" of "apples to watermelons and the comparison is invalid." *See NHDES Report* at 2, 4. Thus, in contrast to the narrow waste collection-disposal service that underlies Petitioners' discrimination claim, communities that rely on flow control provide considerably more comprehensive waste management services, and that substantial dissimilarity precludes "any notion of discrimination." *See General Motors*, 519 U.S. at 298.[11]

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[11] Like their discrimination claim, Petitioners' argument that flow control increases costs, *see, e.g.*, Pet. Br. at 5 (in which *amici* NSWMA, *et al.*, join), is based on the same illogical comparison of disposal-only tipping fees (at landfills and transfer stations) with *system* fees, such as Oneida-Herkimer's, which support an integrated system of environmentally-essential services. In fact, when properly analyzed on an equivalent service basis, communities that rely on flow control do not pay more for their waste management services than non-flow control communities. Thus, as EPA has explained, when tipping fees charged for flow control-reliant and non-flow control facilities are "'broken down into [their] component parts, prices are usually comparable for facilities sited in similar locations and built about the same time.'" *Report to Congress on Flow Control* at III-57 (quoting Moody's Public Finance, *Perspectives on Solid Waste*, at 3 (Aug. 16, 1993)). That point is also demonstrated in the record: Oneida-Herkimer's cost for transportation and disposal of non-recyclable waste ($46 per ton) is more than ten percent below the average tipping fee for disposal of solid waste at private transfer stations in New York state. *See* J.A. 17a, Dkt. Entry No. 172, Exh. 27, p. 195; J.A. 214a (¶ 45). *See also id.* at 365a-366a (¶ 24). In addressing this very point, the *NHDES Report* explained that "[t]o yield an accurate comparison of tipping fees at public, flow-controlled disposal facilities against those at private facilities," it is necessary to "identif[y] and eliminate[] the costs of IWM programs at the flow-controlled facilities, or add[] the cost of comparable IWM programs to the reported tipping fees at private facilities." *NHDES Report* at 2.

C. Petitioners' Suggested Alternatives To Flow Control Would Have The Same Effect On Commerce, Which Further Belies Petitioners' Discrimination And Undue Burden Claims

Although flow control has minimal impact on interstate commerce (and, if anything, the impact is positive, *see infra* pp. 22-23), Petitioners nevertheless argue that "respondents could finance their waste management facilities without imposing any regulatory restrictions on interstate trade," (Pet. Br. 43) and cite their expert witness report, which says ""[t]axes, fees, regulations, and contracts are effective means to meet the objectives of . . . flow control" and "[t]hese means have much less impact on interstate commerce." J.A. 215a; *see also* Pet. Br. at 11, 18. The record, however, including Petitioners' witness's testimony, refutes Petitioners' argument.

Thus, as already noted (*supra* n.11) Oneida-Herkimer's costs for transportation and disposal of non-recyclable waste are quite competitive and would not require flow control if that service was offered in isolation from the rest of Oneida-Herkimer's integrated waste management services. For that reason, the subsidies suggested by Petitioners would be directed to recycling and similar services which, as discussed above (*see supra* pp. 15-18), do not lend themselves to generation of their own revenues. Petitioners' expert witness (Dr. Berkman) addressed this point when he suggested that taxes could be used in lieu of flow control to subsidize the non-disposal portions of the Oneida-Herkimer system:

> Well, the tax revenues that would be collected in that process *could be put to exactly the same purposes the current tipping fees are being put to*, at least those tipping fees in excess of the actual disposal costs.
>
> Those additional fees right now are used to finance the recycling and education program.

Berkman Dep., Tr. 155 (emphasis added). Put another way, and as Petitioners themselves recognize, changing from flow control to a system of disposal fees and tax subsidies for recycling and other programs would not change the impact on commerce because the very same recycling, waste processing and disposal facilities would be used (albeit, less material would be recycled and more would require disposal).

In fact, when this precise point was raised below Petitioners were relegated to arguing (given their witness's testimony) that if flow control's impact on commerce is the same as Petitioners' alternatives, "then it proves that the flow control provisions are unnecessary . . . [b]ecause the Counties can achieve their waste management goals without banning interstate trade in waste processing and disposal." Reply Brief of Plaintiffs-Appellants at 17, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. 05-2024 (2nd Cir. Oct. 3, 2005). Petitioners' position is invalid on several bases. First, Petitioners disregard the fact, noted above (*see supra* note 8, *see generally* pp. 16-18), that flow control provides a significantly greater incentive for recycling in comparison to tax subsidies. In addition, other alternatives indisputably have greater impact on commerce than flow control. *See United Haulers II*, Pet. App. 6a (Petitioners "conceded at oral argument that the Counties could create a public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause").

But at least equally important, Petitioners ignore the relevant inquiry under the dormant Commerce Clause, which is whether there are available *nondiscriminatory* alternatives that have *less* impact on commerce. *See Oregon Waste Sys.*, 511 U.S. at 100-01 (enforcement of a discriminatory regulation may be precluded if nondiscriminatory alternatives available); *New Energy Co.*, 486 U.S. at 278 (same); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)

(extent of burden tolerated will depend on the nature of the local interest involved and "whether it could be promoted as well with a lesser impact on interstate activities").[12] Petitioners' alternatives (e.g., tax subsidies) are, unlike flow control, non-regulatory, but they are surely no less burdensome or discriminatory than flow control (which, in fact, is neither discriminatory nor burdensome) because they would result in use of the very same facilities. In such circumstances, the choice among alternatives is not for the courts, however, but rather for Oneida-Herkimer and other states and localities responsible for municipal waste management. *See Locomotive Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 142 (1968) ("If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective." (*quoting Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)); *see also Camps Newfound/Owatonna*, 520 U.S. at 603 n.3 ("Where regulatory discrimination against out-of-state interests is appropriate, the negative Commerce Clause is not designed to push a State into nonregulatory discrimination instead.") (Scalia, J., dissenting).

D. Petitioners' Undue Burden Argument Ignores The Record

Finally, the premise for Petitioners' "undue burden" argument is that "widespread adoption of the flow-control measures at issue would virtually eliminate the movement of waste between jurisdictions." Pet. Br. 44 (internal citations

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[12] *See also Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (referring to the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems," the Court upholds a Minnesota statute banning the retail sale of milk in plastic non-recyclable containers and rejects alternatives that "are either more burdensome on commerce" or, in comparison to the statute at issue, "less likely to be effective (as, for example, providing incentives for recycling).").

omitted); *see generally id.* at 42-44. Petitioners' argument has no merit.

As an initial matter *amici* would note that despite a remand spanning more than three years with extensive discovery, *see United Haulers II*, Pet. App. 7a, Petitioners cannot point to any evidence to support their position. In that regard, there is no evidence suggesting that Oneida-Herkimer's use of flow control has decreased the level of interstate waste shipments that would have taken place in the absence of flow control (if anything, the record shows the opposite), and Petitioners do not dispute that Oneida-Herkimer has increased interstate commerce in recyclables. J.A. 362a-363a (¶ 19), 371a-372a (¶ 34). Moreover, other local governments' replication of Oneida-Herkimer's use of flow control through operation of publicly-owned transfer stations could "increase[] interstate commerce and . . . competition in the waste disposal marketplace" by facilitating interstate shipment of waste that was previously disposed locally (and Oneida-Herkimer's future use of flow control in connection with its publicly-owned landfill will likely lead to a reduction in disposal fees in the private-sector marketplace). *Id.* at 372a-373a (¶¶ 34, 36); *see also id.* at 393a (¶ 67). In addition, communities that use flow control place significant reliance on private enterprise, and in many instances the affected recycling, resource recovery and other facilities are privately owned and/or operated, and procured through competitive bidding. Thus, as EPA has noted, "the private sector has an ownership or operational role for 84 percent of WTE [waste-to-energy] throughput, including most of the larger WTEs," *Report to Congress on Flow Control* at III-58, which complements Petitioners' witness's recognition of the correlation between reliance on flow control and development of waste-to-energy facilities. J.A. 202a n.12.

Giving the lack of evidence, Petitioners try to support their argument by misstating Justice O'Connor's separate

opinion in *Carbone* and ignoring the fact that the flow control ordinance at issue there, unlike the ordinances here (or any other flow control ordinance of which *amici* are aware), attempted to regulate disposal of waste that was merely in transit through the Town of Clarkstown. Specifically referring to that unique aspect of the ordinance ("Under Local Law 9 . . . waste from New Jersey . . . must be transported to Clarkstown's [New York] transfer facility"), 511 U.S. at 407, Justice O'Connor noted that "the practical effect of [Local Law 9] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted *similar* legislation." *Id.* at 406 (internal quotations omitted; emphasis added). On that basis Justice O'Connor concluded that "[i]f . . . localities in [other] States impose *the type of restriction* on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired." *Id.* (emphasis added). In this case, however, Petitioners "have not argued that the [Oneida-Herkimer] ordinances – which apply only to waste generated in [the] . . . Counties – conflict in any respect with the regulatory requirements imposed by any other jurisdiction." *United Haulers II*, Pet. App. 10a. Thus, Petitioners' argument is not only inapposite to this case, but to the use of flow control generally.[13]

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[13] *Amici* would also note that Petitioners' *stare decisis* argument (Pet. Br. 37-41) misstates this Court's precedent. Contrary to Petitioners, the reference to "special force" in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), specifically excludes "the context of constitutional interpretation." A reduced role for *stare decisis* "is particularly true in constitutional cases[] because in such cases correction through legislative action is practically impossible." *Payne v. Tenn.*, 501 U.S. 808, 828 (1991) (internal citations and quotations omitted). *See also Camps Newfound/Owatonna, Inc.*, 520 U.S. at 636-37 (Thomas, J.,

In sum, flow control reflects a commendable cost-internalizing policy by which local governments assume responsibility for management of the solid waste their citizens generate. *See* Paula C. Murray and David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 Harv. Envtl. L. Rev. 71 (2003); *see also,* The Solid Waste Dilemma, 53 Fed. Reg. 36,883, 36,885 (1988) (EPA encourages state and local government to "assume responsibility for the wastes generated within their jurisdictions," including participation in substate and multi-state management solutions (such as Oneida-Herkimer's bi-county authority)). Given that "[w]aste is neither a natural resource nor in short supply," Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219, 1244, n.116 (1992), "the cumulative effect" of reliance on flow control, "particularly in furtherance of effective waste management, will only be positive." *Id.*

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dissenting) ("Precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*."). Petitioners' argument is further refuted by their concession that Respondents could entirely displace private waste collection-disposal firms, without violating the Commerce Clause, by establishing a public monopoly, *United Haulers II*, Pet. App. 6a, as well as the fact that various court of appeals decisions, in addition to the Second Circuit here, have been favorable to local government in flow control cases. *See, e.g., Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt.*, 389 F.3d 491 (5th Cir. 2004); *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *Houlton Citizens' Coal*, 175 F.3d 178 (1st Cir. 1999), *Harvey & Harvey*, 68 F.3d 788 (3d Cir. 1995). Petitioners also implicitly acknowledge that the "sea change" they foresee (which *amici* submit would be positive) has not arisen in the more than five years since *United Haulers I* was decided.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix – Description of Amici

The Arkansas Association of Regional Solid Waste Management Districts was organized in 1994. Among other things, the association encourages integrated waste management (IWM) for the state's seventeen regional solid waste management districts and facilitates common solutions to municipal solid waste management problems. Various association members rely on flow control as a key solid waste planning and management tool.

Bristol Resource Recovery Facility Operating Committee (BRRFOC) was established in 1985 to advance IWM in fourteen Connecticut cities and towns with an estimated population of more than 300,000. BRRFOC has relied on flow control authority as a fundamental tool for its IWM system, which includes public education on waste reduction and avoidance, recycling and household hazardous waste collection, and a state of the art waste-to-energy (WTE) facility.

Established in 1972, Cape May County Municipal Utilities Authority (CMCMUA) provides solid waste (and sanitary wastewater) management for all municipalities of Cape May County, New Jersey (peak summer population of more than 600,000). CMCMUA's IWM system has traditionally relied on flow control and includes aggressive recycling (achieving a 59% recycling rate in 2005), waste reduction and household hazardous waste collection programs, which are subsidized by a system fee on solid waste disposal. CMCMUA also reclaims energy through landfill gas recovery.

The City of Tampa, Florida's integrated waste management system encompasses recycling and household hazardous waste programs as well as the state-of-the-art McKay Bay WTE Facility. The City's integrated system has relied on flow control since 1985.

Founded in 1966, the Connecticut Conference of Municipalities (CCM) has 140 member municipalities representing 90 percent of Connecticut's population. CCM represents its members before the Connecticut General Assembly, executive branch and regulatory agencies and in state and federal courts in matters of significant public policy concern, such as the important flow control issues presented in *United Haulers v. Oneida-Herkimer*.

The Connecticut Resources Recovery Authority (CRRA) is a quasi-public state agency established in 1973 to modernize Connecticut's solid waste disposal system. Serving 118

Connecticut cities and towns with a population of more than 2.4 million, CRRA's comprehensive system includes four state-of-the-art WTE facilities, two regional recycling centers, twelve transfer stations and two interactive education centers. CRRA has relied on flow control authority to carry out its statutory directive to implement solid waste disposal and resources recovery systems throughout Connecticut.

The Delaware County Solid Waste Authority was established in 1954. Serving a county of more than 555,000 residents in populous southeastern Pennsylvania, the Authority's IWM programs were established in reliance on flow control authority and emphasize waste reduction and recycling and the use of best available technology, including a modern WTE facility that began operation in 1992.

ecomaine is the successor by merger to Regional Waste Systems, which was established in 1974, to provide an IWM system for its twenty-one member-owner municipalities in southern Maine. Following extensive planning and public deliberation (at municipal, regional and state levels), the member municipalities voted to construct a modern WTE facility to replace reliance on landfills. Bonded indebtedness in excess of $76,000,000 was issued for the system's facilities (which includes Maine's largest recycling program) in reliance on the use of flow control authority.

The Greater Lebanon Refuse Authority (GLRA) was formed in 1959 and serves twenty-six municipalities in south-central Pennsylvania. GLRA has relied on flow control authority to provide environmentally advanced IWM services, including an aggressive recycling program (which achieved a 58% recycling rate in 2005), composting, operation of a modern landfill and a renewable energy (landfill gas) power production facility.

Marion County, Oregon utilizes IWM to serve its 300,000 citizens, which includes Salem (Oregon's capitol) and nineteen other cities. Facilities include a modern WTE facility, two transfer stations, an ash monofill, a construction and demolition debris landfill, and yard waste composting and household hazardous waste collection facilities. The County has relied on flow control authority since 1986 to facilitate implementation of this IWM system.

Metro Regional Government is an Oregon metropolitan service district that manages solid waste processing, disposal and

recycling with the aid of an enacted flow control ordinance. Other Metro responsibilities include protection of open space and parks and land use planning and transportation for the 1.3 million residents of the three counties and twenty-five cities in the greater Portland, Oregon, metropolitan area.

The Minnesota Resource Recovery Association (MRRA) is a public-private partnership for the development and operation of modern WTE facilities and other aspects of integrated waste management. MRRA represents WTE facilities serving Minnesota's Anoka, Beltrami, Benton, Carver, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Mahnomen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin counties and the cities of Red Wing and Perham.

Montgomery County, Ohio provides integrated solid waste management for the approximately 500,000 residents of the greater Dayton area, including recycling, waste reduction and waste disposal services. The County's innovative waste management solutions date back to the 1960s with the construction of two waste combustion facilities that began operation in 1970. Despite long-term reliance on flow control authority, the uncertainties associated with the *C&A Carbone* decision prevented the County from proceeding with planned retrofits of its waste combustion plants.

The New York State Association of Counties (NYSAC) is a statewide association representing elected county executives, supervisors, legislators, representatives, commissioners and public administrators from New York's sixty-two counties, including the City of New York. NYSAC's activities address a number of essential governmental functions for the benefit of all county governments in New York. NYSAC is a frequent advocate in state and federal courts on important matters of public policy, such as the importance of solid waste flow control to environmentally protective solid waste management programs.

The Northwest Arkansas Regional Solid Waste Management District was established by the Arkansas General Assembly in 1991. The District provides a range of IWM services to the twenty-two municipalities in the District's six-county region. In reliance on flow control, the District incurred significant public debt to develop its waste management system, and the District's

flow control regulations were upheld in *IESI AR Corp. v. Northwest Ark. Regional Solid Waste Mgt. Dist.*, 433 F.3d 600 (8th Cir. 2006).

Outagamie County, Wisconsin, manages its IWM program to serve the best long-term interests of its thirty-two municipalities and the environment. Aggressive waste recycling-reduction-energy recovery programs address used tires, yard waste, appliances, scrap metal, construction and demolition waste, electronics and (in the near future) pharmaceuticals as well as renewable energy (landfill gas) production. These programs avoid reliance on taxes through use of an enterprise fund in conjunction with waste flow control in municipal contracts. Outagamie County recently joined two adjacent counties to collaborate on IWM services for a three-county area of over 500,000 residents.

Pine Belt Regional Solid Waste Authority is a Mississippi public benefit corporation formed in 1992 to provide IWM services for the counties of Covington, Jones, Perry and Stone, and the cities of Petal, Laurel and Hattiesburg. A challenge to Authority members' reliance on flow control was rejected in *National Solid Waste Management Assoc. v. Pine Belt Regional Solid Waste Auth.*, 389 F.3d 491 (5th Cir. 2004).

Snohomish County, Washington (population approximately 650,000) is in the central Puget Sound region approximately 30 miles north of Seattle. The County disposes of municipal solid waste generated within its borders through a competitively bid contract. The County works in cooperation with its cities and towns to provide environmentally responsible solid waste disposal, solid and household hazardous waste recycling, prevent illegal dumping, and assure cleanup and monitoring of closed landfills.

The Solid Waste Authority of Central Ohio (SWACO) serves Franklin County (Columbus) and parts of five surrounding counties, with a population of over 1.2 million. Since its inception in 1989, SWACO has been a catalyst for recycling and cutting-edge programs to find new uses for waste. Despite long-term reliance on flow control, uncertainties resulting from the *Carbone* decision prevented SWACO from upgrading its 2,000 ton-per-day WTE plant, which was instead required to shutdown. Today SWACO's comprehensive solid waste management plan addresses operation of its landfill and transfer stations and provides, without charge, a variety of recycling and waste minimization services.

Serving a population of 270,000, the Solid Waste Disposal Authority of the City of Huntsville, Alabama operates a 690 ton-per-day WTE (steam) plant, curbside recycling, landfill gas recovery, metals recovery, sewage sludge incineration, and household hazardous waste programs. In reliance on flow control, the Authority has issued $121 million in bonds, and all Authority services are financed from system fees and steam sale proceeds.

Protection of the environment was a primary consideration in the development of the Spokane Regional Solid Waste System (RSWS) by the City of Spokane and Spokane County, Washington. Reliance on flow control authority and an integrated system fee have been principal factors in implementing the Spokane RSWS, which provides solid waste reduction, recycling, recovery of energy from waste, composting and household hazardous waste collection in an environmentally safe and cost-effective manner and consistent with state requirements and objectives for solid waste management planning.

The Wasatch Integrated Waste Management District is a Utah special service district organized in 1984 to manage solid waste for Davis and Morgan counties and sixteen cities. Wasatch serves a population of more than 230,000 with a state-of-the-art WTE facility, a modern gas recovery-equipped landfill, and a variety of additional IWM services. Reliance on flow control authority has been critical for all of these programs, and a successful by-product of the Wasatch system is the sale of steam and electricity to serve adjacent Hill Air Force Base.

Established in 1971 to assure environmentally sound management for all municipal solid waste generated in York County, Pennsylvania, the York County Solid Waste and Refuse Authority serves a population of more than 400,000. The Authority's programs emphasize waste reduction and recycling and use of best available technology, which led to development of a modern WTE facility that began operation in 1989 and generates renewable energy to serve approximately 20,000 homes. To avoid reliance on taxes while securing sufficient revenue to support WTE technology's greater initial cost (as well as the cost of recycling and household hazardous waste collection services, which are provided without charge), York County adopted flow control in 1989 with the affected communities' full endorsement.